SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

CROWN CASTLE NG EAST LLC,

Petitioner/Plaintiff,

For a Judgment pursuant to Article 78 of the CPLR

-against-

THE CITY OF RYE, and THE CITY COUNCIL OF THE CITY OF RYE

Respondents/Defendants.

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VERIFIED PETITION/COMPLAINT

Index No._____

Petitioner/Plaintiff Crown Castle NG East LLC ("Petitioner" or "Crown"), by its attorneys Cuddy & Feder LLP, as and for its Verified Petition/Complaint against Respondents/Defendants the City of Rye (the "City") and the City Council of the City of Rye ("City Council") (collectively, "Respondents"), alleges as follows:

SUMMARY OF THE CASE

1. Petitioner is a facilities-based provider and reseller of telephone services that installs, operates and maintains equipment on utility poles in municipal rights of way (as applicable to this action, the "Rye ROW"). This equipment encompasses small cells and distributed antenna systems ("DAS") as part of telecommunications networks that are used by Petitioner's wireless carrier customers, who are licensed by the Federal Communications Commission ("FCC") to provide personal wireless services to the public.

2. These wireless carriers use fiber connected to Petitioner's equipment to transmit wireless radio frequency signals. These signals are relayed from utility pole to utility pole

and transmitted via pole-mounted antennas to the area surrounding each pole to provide coverage so that cell phones and other wireless devices can work properly, such that calls and data transmissions connect and stay connected.

3. Without the utility infrastructure provided by Petitioner, which in turn enables wireless carriers to provide signal coverage, people's tablets, laptops and cell phones will either work poorly, or not at all.

4. The lack of sufficient coverage from wireless carriers hampers people living, working and traveling through Rye from being able to use their devices for personal needs, for business, and for emergencies, such as the need for E911 services in the event of an accident, where a sufficient signal can make a crucial difference.

5. Despite that the City consented back in 2011 to Petitioner's right to deploy its infrastructure in the Rye ROW and allowed Petitioner to do so in other areas of the City not at issue here based on a simple administrative permit review process conducted by City staff, for the past two years, Respondents have disregarded that consent and blocked Petitioner's efforts to install this important utility infrastructure.

6. Respondents have done so by subjecting Petitioner to inapplicable levels of protracted municipal review and by "weaponizing" the New York State Environmental Quality Review Act ("SEQRA").

7. Respondents abused the SEQRA process by its action in April of 2017 of improperly and belatedly classifying Type II actions as "unlisted" and not exempt from SEQRA and issuing a positive declaration, after already subjecting Petitioner to improper environmental review, despite the lack of any significant environmental impacts from placing utility equipment on utility poles, and despite that as a matter of law Petitioner's proposed and City-approved

infrastructure is exempt from SEQRA review.

8. Subjecting Petitioner to these SEQRA and other onerous review processes was also a breach of the parties' February 17, 2011 Right of Way Use Agreement ("RUA"), which precludes Respondents from employing these types of review.

9. Respondents also denied Petitioner's request for approval of its plans to deploy its utility infrastructure despite the fact that Respondents freely allow other utility providers who mount equipment in the Rye ROW (including cable providers deploying the same type of wireless signals as those deployed by Crown's customers) to install their equipment on utility poles, without subjecting those providers to any similar review, and frequently without such installations being reviewed at all.

10. Respondents' actions also violated various state laws, including Section 27 of the New York State Transportation Corporations Law ("NYS TCL"), and Respondents continue to breach their legal and contractual obligations by preventing Petitioner from expanding its infrastructure in the Rye ROW.

11. Respondents have engaged in this illegal conduct in deference to a highly vocal group in Rye opposed to wireless development, led by Joshua Cohn, who, in the fall of 2017 successfully ran for Mayor of Rye based on an anti-wireless platform, and who has now assumed that office as of this month.

12. Respondents improperly deferred to their most outspoken residents while violating several tolling agreements under federal law, falsely asserting material breaches by Crown of the RUA, and refusing to act on Crown's request and permit application in violation of its contractual obligations and Crown's rights under state law.

13. Petitioner comes to this Court to put an end to Respondents' illegal tactics,

and to seek relief that overturns the City's SEQRA determinations and denial and allows for Petitioner to finally install its utility equipment on utility poles in the Rye ROW so that Petitioner's carrier customers can then improve and expand wireless coverage, and so that people's cell phones and other wireless devices can properly work.

14. This proceeding/action is thus brought pursuant to Article 78 and CPLR 3001 challenging among other actions by Respondents: a) the City Council's misclassification of the "action" for SEQRA purposes; b) the City Council's new, self-serving and unsupported interpretations of the parties' RUA which are inconsistent with the City's prior precedent generally and as applied to Petitioner; and c) the City's refusal to acknowledge and issue administrative permits for Crown's proposed expansion of its network with pre-approved equipment under its agreement as requested by Petitioner.

15. Petitioner seeks an order and injunction that, among other relief, overturns actions of the City Council and: a) holds that Crown's expansion of its infrastructure is exempt from SEQRA as a Type II action as set forth in SEQRA regulations and the parties' agreement; b) rejects the City's interpretations of the parties' RUA; c) finds the City in breach of the parties' RUA; and d) directs the City to issue administrative permits for Crown's currently proposed installation of equipment on utility poles and traffic lights in the Rye ROW, which installations are in conformity with the specifications contained in the parties' RUA and relevant criteria for permit approval by City staff.

THE PARTIES

16. Petitioner is a limited liability company organized under the laws of the state of Delaware, with an address at 1220 August Drive, Suite 600, Houston, TX 77057. Petitioner was previously known as NextG Networks of NY, Inc. ("NextG").

17. Respondent City is a municipal corporation of the State of New York, with an address of City Hall, 1051 Boston Post Road, Rye, New York

18. Respondent City Council is a duly elected municipal agency responsible for issuing consents pursuant to Section 27 of the NYS TCL.

VENUE

19. The state law claims asserted herein were alleged in a federal action timely commenced on May 11, 2017, captioned *Crown Castle NG East LLC v. The City of Rye, et al.*, S.D.N.Y. Index No. 17-cv-3535 (VB) ("Federal Action"), which claims were dismissed without prejudice by a judgment rendered on December 11, 2017.

20. The federal court declined to exercise jurisdiction over Petitioner's state law claims and therefore the claims plead in this hybrid Article 78 proceeding and declaratory judgment action are timely plead pursuant to CPLR Section 205(a).

21. This proceeding in part challenges a municipality's erroneous classification of Crown's request/permit applications as not exempt from SEQRA as a Type II action, and subsequent Positive Declaration under SEQRA, and refusal to issue permits for installation of equipment by a telephone company in public rights of way such that adjudication in this Court's Environmental Part is appropriate.

22. This Article 78 proceeding and declaratory judgment action involves final actions of Respondents and related contract interpretations that are ripe for judicial review as

acknowledged by Respondents themselves in Resolutions of the City Council.

THE CPCN, CITY CONSENT RESOLUTION, THE RIGHT OF WAY USE AGREEMENT, AND RESPONDENTS' INITIAL INTERPRETATIONS OF PETITIONER'S DEPLOYMENT RIGHTS IN THE RYE ROW

23. Crown's facilities are used by Crown's customers to provide wireless services to the public pursuant to a Certificate of Public Convenience and Necessity ("CPCN") issued by the Public Service Commission of the State of New York ("NYS PSC") on April 4, 2003. (A copy of the CPCN is attached as **Exhibit 1**).[1]

24. The CPCN authorizes Crown under New York law, including the NYS TCL, to attach communications equipment (a.k.a. nodes) to utility poles in rights of way statewide as a facilities-based provider. This equipment is used by Crown's customers to provide wireless services directly to the public pursuant to Crown's filed tariff(s) with the NYS PSC. (Exhibit 1).

25. Since 2003, Crown has installed numerous DAS facilities throughout the State pursuant to its CPCN, municipal consents and right of way access and/or franchise agreements, including thousands of facilities on streetlights and utility poles in New York City.

26. In 2011, pursuant to New York law and the Rye City Code, the City Council expressly consented through a "Consent Resolution" to Petitioner's use of the Rye ROW to deploy its wireless infrastructure network and facilities pursuant to the CPCN, through which carrier customers could provide wireless services. (The Consent Resolution is attached as **Exhibit 2**).

27. On February 17, 2011, Petitioner and the City also entered into the RUA.

28. The RUA incorporated a municipal franchise for use of certain City owned structures and included, among other terms, pre-approved equipment specifications, detailed permit processes and standards for equipment installations. (A copy of the February 17, 2011 RUA

[1] Unless otherwise specified, exhibit references herein are defined the first time that they are cited, with subsequent references to only the relevant exhibit numbers.

is attached as **Exhibit 3**).

29. The RUA memorialized terms and conditions for Petitioner's ongoing access to and installations in the Rye ROW (which rights also exist independent of the RUA) and incorporated general process applicable to permitting for other certificated telecommunications companies and utilities in Rye. (Exhibit 3).

30. The RUA specified that the same review processes applied to other utility providers with equipment in the Rye ROW must be applied in like manner to Crown. (Exhibit 3).

31. Over five years following the parties' entering into the Consent Resolution and the RUA, Petitioner installed in the Rye ROW fiber optic lines, equipment cabinets and antennas on utility poles owned by Consolidated Edison, Inc. ("Con Ed"), light poles owned by Westchester County, and on other facilities (the "Initial Installations").

32. These Initial Installations from 2011 to 2015 were in accordance with Petitioner's CPCN, pole attachment agreements with Con Ed, permits issued by Westchester County, the Consent Resolution, the RUA and City Code Chapter 167 (Streets and Sidewalks Law) (a diagram of one of the existing Crown installations in Rye is included in Exhibit A to the RUA). (Exhibit 3, Ex. A).

33. The Initial Installations were subjected to a simple administrative permit review process provided for in the RUA, which review was conducted by City staff.

34. Section 3 of the RUA specifies the City cannot deny a permit "based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Petitioner's] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A." (Exhibit 3 § 3).

35. Exhibit A of the RUA includes several diagrams of equipment attachments

with various types of antennas, cabinets and other equipment on utility poles, street lights and other structures typically located in public rights of way. (Exhibit 3, Ex. A).

36. Mounting equipment on existing utility poles and obtaining right of way access permits for such installations is a Type II action under SEQRA, pursuant to 6 NYCRR 617.5(c)(7), (11) and (19), and express guidance in the NYS DEC SEQRA Handbook.

37. The DEC handbook states that "if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II." DEC, *SEQRA Handbook* 33 (3d ed. 2010). (A copy of the relevant page from the DEC Handbook is attached as **Exhibit 4**).

38. RUA § 11.1 states that Crown's equipment in Exhibit A of the RUA is "functionally equivalent to Type II actions under 6 N.Y.C.R.R. 617.5(c)(11)." (Exhibit 3 § 11.1).

39. For permitting purposes, RUA § 5.1 requires Crown to provide a list of proposed pole attachment locations to the City prior to such installations, and absent any contrary City action, a 30-day deemed granted permit process is incorporated. (Exhibit 3 § 5.1).

40. In approving the Initial Installations following the City granting consent to Crown in 2011, the City concluded that each complied with the RUA, incorporated pre-approved Exhibit A equipment specifications, found Crown's application to be exempt from SEQRA and determined that Petitioner's installations did not require other permits or discretionary review by the City Council or other City agencies pursuant to various City Code chapters.

CITY MANAGEMENT OF OTHER TELECOMMUNICATIONS AND UTILITY INSTALLATIONS IN THE RYE ROW

41. The City never required telephone companies, cable companies or electric utilities to obtain permits for installations in the Rye ROW pursuant to Chapter 167 (Streets and Sidewalks Law). The equipment for which permits have not been required includes electric

transformers, cable boxes, new utility poles, cable Wi-Fi hotspots (which use the same radio frequency technology as Crown's equipment), and electric smart grid wireless antennas.

42. Similarly, the City never has classified such installations as anything other than Type II exempt from SEQRA nor subjected same to Chapters 196 (Wireless Telecommunications Facilities) or 197 (Zoning) of the City Code. Nor did the City impose any such requirements on Petitioner when Petitioner obtained approval for the Initial Installations.

43. Minutes from Respondents' June 8, 2016 meeting reflect that when a Councilwoman asked whether the City had treated each utility the same, Counsel for the City admitted on the record that **"the City has not applied the law uniformly, and by denying their application, the City would not be treating Crown Castle the same as other applicants that have come before."** (*See* June 8, 2016 Minutes attached as **Exhibit 5**, p. 8).

44. RUA § 3 prohibits the City from requiring Petitioner to obtain zoning or other similar types of permits for installations in the Rye ROW, unless such requirements are also imposed equally on other companies who occupy the Rye ROW such as cable franchisees or wireline telephone companies, a.k.a. Incumbent Local Exchange Carriers ("ILEC"). (Exhibit 3).

45. RUA § 5.1 further provides that Petitioner may only be subject to a permitting review process and permit fees if "the permit fees and process that the City requests of [Petitioner] are functionally equivalent to the fees and the process that are applied to the ILEC and/or the cable provider(s)." (Exhibit 3).

46. The RUA included these provisions to protect against discriminatory or prohibitory application of the City Code to Crown in violation of law.

47. These provisions also provide a more specific process for the parties given the City's practice with respect to other companies with less detailed franchise agreements and/or

the City's application of Chapter 167 of the City Code regarding installations in the Rye ROW.

CROWN'S CONSULTATIONS WITH CITY STAFF PURSUANT TO THE RUA AND PERMIT APPLICATION FOR ADDITIONAL PLANNED EQUIPMENT INSTALLATIONS

48. In the fall of 2015, one of Crown's existing customers in Rye requested that the company expand its network to provide services to various geographic areas of Rye.

49. In December 2015, Crown advised the City of its intent to deploy additional equipment in Rye and provided the City with a list of proposed locations pursuant to Sections 3 and 5.1 of the RUA, principally existing Con Ed utility poles in the Rye ROW.

50. At that time, Crown also discussed interpretation of the RUA with the City, including the definition of "Equipment" in relation to a dimensionally larger equipment cabinet proposed for use in Rye, which is substantially similar to the examples of pre-approved equipment cabinets depicted in Exhibit A to the RUA. (Exhibit 3, Ex. A).

51. Crown's position, which was consistent with prior precedent and Crown's state law and contract rights, was that only the City Manager or City Engineer needed to agree that the larger proposed equipment cabinet size was permitted under the RUA.

52. Crown also believed that this interpretation along with the City Manager/City Engineer's approval of the equipment locations for purposes of the RUA and Chapter 167 of the City Code was the only required action prior to installations by Crown.

53. City staff, however, determined that interpretation of the RUA as related to the proposed larger equipment cabinet specifications should be referred to the City Council for review and/or approval of an RUA amendment to incorporate the larger cabinet into the RUA.

54. City staff also suggested, contrary to the RUA, counter to its determinations with respect to other companies' telecommunications, electric, cable and landline equipment

installations (which equipment on information and belief is similar or larger in size than the equipment proposed by Crown) in the Rye ROW, and in contravention of its prior interpretations of the City Code on the Initial Installations, that the City Council would likely assert a form of "approval" jurisdiction over the locations for pole attachments in this proposed DAS expansion.

55. Petitioner reserved all rights following its initial discussions with City officials, noting that City Council approval of the locations for installations of Crown equipment on poles in the Rye ROW was never previously required under Sections 3 and 5.1 of the RUA, nor was such approval consistent with the intent of the RUA and Consent Resolution.

CROWN'S INTERPRETATION/AMENDMENT REQUEST AND CITY COUNCIL ASSERTION OF PERMIT JURISDICTION

56. In an April 8, 2016 letter to the City Council, Petitioner confirmed for the City that it planned to install additional equipment in Rye as part of an existing customer contract. In that letter, Petitioner requested that the City Council interpret the RUA on a single question – whether the RUA allowed for installation of a slightly larger equipment cabinet on poles in the Rye ROW than shown in Exhibit A of the RUA, or whether the City thought it necessary to amend the RUA to incorporate the proposed larger equipment cabinet as part of Crown's authorized installations in the Rye ROW.

57. The larger cabinet was needed to physically accommodate customer requested equipment for use in the network and to facilitate future shared use of Crown's network by other wireless carriers.

58. In response to Crown's request for an interpretation or amendment to the RUA, the City Council, sua sponte and over Crown's objection, asserted approval and permitting jurisdiction over Crown's entire DAS network expansion's design and the locations for equipment planned in the Rye ROW, despite the City's admissions that such review had not been imposed on

other utility providers in the Rye ROW (Exhibit 5, p. 8), and despite Crown's CPCN, pole attachment agreements with pole owners including Con Ed and the City, the Consent Resolution and the RUA terms governing permit review and approval of Petitioner's standard installations in the Rye ROW by City staff.

59. The City Council's assertion of approval jurisdiction over the DAS expansion network locations was not based on any public safety concerns as contemplated by the RUA. Instead, it was a reaction to the overall number of locations proposed for equipment installations, despite the City Council's delegation of authority on those issues to City staff and Section 5.1 of the RUA and the RUA's express prohibition against denials based on the quantity of equipment deployed in Rye. (Exhibit 3).

60. The City Council also referred the Crown request/permit application to the City's Board of Architectural Review ("BAR") for review and recommendations.

61. In May 2016, the City BAR reviewed Crown's proposed larger equipment cabinet size and information on the 73 utility/light pole attachment locations proposed by Crown.

62. In an advisory role to the City Council, the City BAR approved the larger equipment cabinet size and Crown's proposed DAS network expansion.

63. Despite the City BAR's referral back to the City Council for action, the City Council deferred deciding Crown's application and departed from its prior precedent by noticing and holding a public hearing, despite no legal requirement to do so.

CITY COUNCIL CONDUCTS PUBLIC HEARINGS AND A CITIZEN GROUP OPPOSES CROWN'S DAS EXPANSION IN RYE

64. As part of an initial June 2016 public hearing, the City Council heard: (1) generalized objections from Rye residents (organized into a "Citizens Group"); (2) accusations unsupported by evidence (including purported adverse health impacts); (3) positions regarding SEQRA and property values, questions regarding the "need" for DAS expansion; and (4) requests that the City reverse prior interpretations of the City Code and mandate submission of a special permit application for Crown's application under City Code Chapter 196 and prior to any further consideration of Crown's request/permit application pursuant to the RUA. (Exhibit 5, pp. 6-9).

65. It was at that June 8, 2016 meeting that the City's counsel "responded that the City has not applied the law uniformly, and by denying their application, the City would not be treating Crown Castle the same as other applicants that have come before." (Exhibit 5, p. 8).

66. The Citizens Group further challenged the politics of certain City Council members aided by some "anti-wireless" sentiment in the community and supported by some City Council members. (Exhibit 5, pp. 8-9).

67. To respond to the Citizens Group statements and public filings in the City Council proceeding, Crown retained outside counsel and in a June 17, 2016 letter, noted that (*inter alia*): (a) Crown is a CPCN holder with statewide authority to deploy telephone equipment in rights of way, for use by Crown's customers to provide wireless services; (b) under NYS TCL § 27, Crown has the right to "erect, construct and maintain the necessary fixtures . . . over or under any of the public road, streets and highways" subject to City consent and permits; (c) City consent for Crown's authorization for installations in the Rye ROW was granted by the 2011 Consent Resolution; (d) RUA § 3 and 5 confirm Crown's installations are not subject to the City's zoning or other land use chapters in the City Code (e.g. Chapters 196 and 197) and include the permit

criteria for administration by City staff in furtherance of Chapter 167 of the City Code; and (e) the special permit requirements of City Code Chapter 196 do not apply to wireless equipment on utility poles in the Rye ROW (pursuant to Code interpretations by the City related to the cable company's Wi-Fi transmitters and prior City determinations on Petitioner's Initial Installations) and such installations are regulated at most like other telecommunications installations pursuant to Chapter 167 of the City's Code.

68. Crown further advised the City that, should the City Council heed the Citizens Group's request to deny the Crown's application under the RUA and determine that, unlike the Initial Installations, the proposed DAS expansion would need to undergo special permit review under Chapter 196, the City would be in breach of the RUA and acting beyond its jurisdiction over pole attachments in violation of federal, state and municipal laws.

69. Counsel for Crown further identified for the City that the dimensionally larger equipment cabinet specifications had already been approved by Con Ed as part of Crown's pole attachment agreement as a safe and permitted attachment to its utility poles.

70. Counsel for Crown also explained that the City had not identified any traffic or pedestrian safety considerations associated with the proposed pole attachments as part of Crown's planned DAS expansion and which might otherwise justify a denial of permits pursuant to Sections 3 and 5 of the RUA and/or Chapter 167 of the City Code.

71. In a June 24, 2016 follow up letter, counsel for Crown noted that Crown's application and the City Council's review involved an exempt action under SEQRA otherwise known as Type II under SEQRA, and as such SEQRA review or a positive declaration would be wholly inappropriate.

72. Crown's filings reiterated for the City Council that the project involved

attachment of equipment to utility poles in the Rye ROW, with no visual impacts different from existing installations such as Con Ed transformers, Cablevision/Altice boxes, fiber optic wires and Wi-Fi antennas (which use the same technology as wireless carriers and have never been regulated by the City), and other routinely installed equipment in the Rye ROW.

73. Crown, though counsel, requested that the City Council adopt a resolution confirming the action was Type II, or alternatively adopting a SEQRA negative declaration and approving the Crown application at its July 13, 2016 City Council meeting.

THE CITY COUNCIL REFUSES TO ACT ON CROWN'S REQUEST/PERMIT APPLICATION AND STATES AN INTENT TO RETAIN A TECHNICAL CONSULTANT

74. The City Council refused to act on Crown's application at its July 13, 2016 meeting and continued the public hearing.

75. The City Council then stated its intent to hire a telecommunications consultant to assist it with what it called a limited scope of review related solely to the "need" for the DAS expansion to provide wireless services in Rye and as the only outstanding item it wanted to consider prior to voting.

76. Crown objected to the City Council's review with a telecommunications consultant noting that the "need" for the DAS expansion was not legally at issue or relevant to criteria for permit approval under the RUA and related City Codes.

THE CITY COUNCIL BOWS TO PUBLIC PRESSURE AND DECIDES TO HIRE OUTSIDE COUNSEL

77. The City Council did not retain a telecommunications consultant at its next public hearing on Crown's request/permit application.

78. Instead, in August 2016 in the face of threatened litigation by the Citizen Group, and in response to calls from the public to find a way to deny Crown's requests and prohibit

the DAS expansion in Rye, the City Council voted to hire outside counsel.

79. The City subsequently retained outside counsel in August of 2016.

80. The City outside counsel's first engagement was at Crown's request to negotiate a tolling agreement extending the time for the City to decide on Crown's application given federal requirements requiring action on permit applications within 150 days of filing.

81. A tolling agreement was executed by counsel for the parties and incorporated specific timelines for the City to request any additional information from Crown, close the public hearing and act on Crown's request/permit application (the "Tolling Agreement").

82. Crown then supplied additional technical information to the telecommunications consultant retained by the City's outside counsel, demonstrating the technical basis for Crown's design of the DAS network expansion and why its customer was requesting Crown to install equipment in various locations in Rye to provide services to the public.

83. To Crown's shock and surprise, the City's outside counsel next demanded responses from Crown to what could best be described as interrogatories and other new, multiple information requests going far beyond the Tolling Agreement, the RUA or any relevant criteria.

84. Petitioner, with reservations of rights and objections to violation of the Tolling Agreement, nevertheless gave the City a detailed September 14, 2016 submission to facilitate a final decision on Crown's application by early October as per the Tolling Agreement.

THE CITY COUNCIL PROCEEDINGS TURN PATENTLY ADVERSE TO CROWN

85. While Crown was working with City staff and consultants to address their requests for information prior to a final decision on Crown's application, the Citizens Group and certain members of the City Council asserted false allegations about Crown's Initial Installations.

86. Citizens Group complaints regarding "noise" from the Initial Installations

led Crown to inspect its facilities and share the results with the City to demonstrate compliance with the RUA (and FCC requirements) and those City Code chapters incorporating noise standards in Rye.

87. In furtherance of certain City Council member assertions that Crown illegally installed antennas and equipment, Crown supplied the City with evidence of its prior filings under the RUA and City staff approvals of the Initial Installations, and further confirmed that certain "recently installed new poles/towers with antennas" were Con Ed smart grid installations in the Rye ROW that the City had not issued permits for or otherwise regulated.

88. The City next raised other new considerations in an October 4, 2016 letter to counsel for Crown attempting to expand again, *sua sponte*, the purported scope of the City Council proceeding.

89. On October 5, 2016, the City Council stated its intent to act as the Lead Agency under SEQRA and required Crown to prepare a Full Environmental Assessment Form, typically reserved for Type I actions, and supply it with more information before it would rule on whether the Crown application was Type II exempt from SEQRA as noted in the DEC Handbook and the RUA.

90. The City Council's October 5, 2016 action in and of itself was a procedural violation of Section 617.6(a)(1) of the SEQRA regulations which requires classification of an action to be made at the earliest possible point in time and if Type II, the Lead Agency acknowledge it has no further responsibilities for SEQRA purposes.

CROWN FILES AN ALTERNATIVE PERMIT APPLICATION WITH CITY STAFF PURSUANT TO SECTIONS 3 AND 5 OF THE RUA AND WHICH INCORPORATED PRE-APPROVED EXHIBIT A EQUIPMENT

91. On October 5, 2016, Crown filed with City staff and the City Council an alternative new request pursuant to RUA §§ 3 and 5.1 for administrative City staff permit approvals for conforming Exhibit A equipment (at the pre-approved equipment cabinet size) on 64 Con Ed utility pole locations (so-called "Plan B") and irrespective of its pending request to interpret/amend the RUA to allow a larger cabinet.

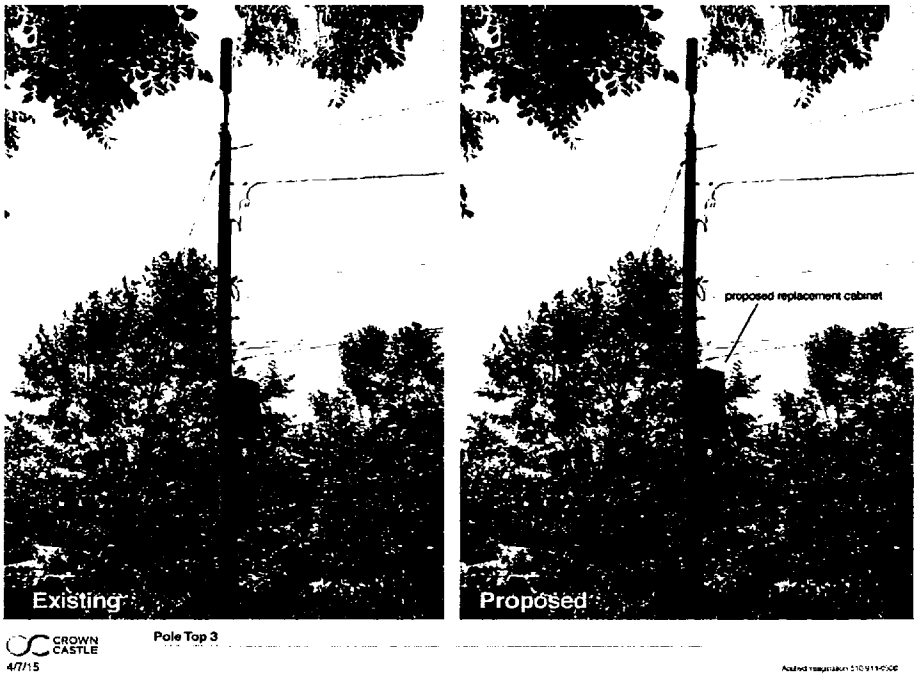
92. On October 14, 2016, the City demanded additional SEQRA information from Crown and categorically rejected Crown's filing of an alternative and new request, citing without legal justification the pending City Council proceeding on Crown's initial request/permit application, and its intent to assert jurisdiction over any Crown plans to expand its DAS network in Rye.

93. On October 19, 2016, counsel for Crown wrote to the City stating Crown's concerns regarding the SEQRA process on the application and, over objection, provided the City with a SEQRA Full Environmental Assessment Form with supporting exhibits for use by the City in the event the Crown application was deemed not Type II exempt and subject to SEQRA review.

94. On October 19, 2016, Crown also submitted reports confirming the New York State Historic Preservation Officer ("SHPO") determined the proposed equipment installations would not have an adverse effect on historic resources pursuant to Section 106 of the National Historic Preservation Act, the National Environmental Protection Act and related FCC regulations, which should have disposed of any potential SEQRA historic impact issue.

95. On October 19, 2016, Crown also submitted a series of photographs for each Con Ed pole attachment location, photos of existing and proposed Crown equipment installations

in Rye, construction drawings for each installation, City noise code compliance reports for a fully loaded equipment cabinet, and several legal cites including that purported property value impacts were not legally a SEQRA consideration or at issue in the Crown request/permit application. One photograph mock-up submitted on October 19, 2016 showed an existing node compared to the slightly larger proposed node, underscoring the de minimus difference between the two:



96. Counsel for Crown cautioned the City in its October 19, 2016 letter that SEQRA could not be used as a delay tactic and that Respondents' actions were contrary to Crown's legal and contractual rights under the RUA.

RESPONDENTS' ATTEMPT TO TERMINATE THE RUA BY FALSELY ALLEGING BREACH

97. On October 25, 2016, the City sent Crown a notice which in bad faith declared Crown to be in "material breach" of the RUA, and further stated the City's intent to terminate the agreement within 45 days of the notice unless the claimed "material breach" was cured by Crown.

98. The City's material breach claims were premised on two allegations: (a) that the RUA would not allow Crown to install customer owned transmitting units in the cabinets installed on poles as planned for in the DAS expansion and regardless of the fact that the City approved Initial Installations incorporated such customer provided equipment; and (b) that Crown had allegedly failed to review City owned street and/or traffic lights for the DAS expansion, which installations are an economic preference for the City as set forth in the RUA.

99. Crown's CPCN, the Consent Resolution and the RUA are *all* premised on Crown's facilities based network being used by wireless carriers to transmit their FCC licensed spectrum from equipment installed as part of the system and used to provide services to the public.

100. The very first recital in the RUA itself specifically references that Petitioner deploys infrastructure for the purpose of "serving [Crown's] wireless carrier customers," and RUA §3 acknowledges that the purpose of the agreement is to allow for Petitioner to construct and operate the "Network" and provide "Services" as those terms are broadly defined. (Exhibit 3).

101. The RUA specifically defines "Equipment" as equipment "to be installed and operated by [Crown] hereunder," and nowhere in this definition is there any requirement that Crown be the owner of all the equipment installed as part of the "Network" or a limitation on customer owned equipment. (Exhibit 3 § 1.3).

102. In 2011, when it adopted the Consent Resolution in response to a detailed filing by NextG and authorized execution of the RUA, the City Council knew that a DAS system, without equipment used by wireless carriers to transmit FCC spectrum licensed to such carriers, would have no function and be completely counter to Crown's CPCN granting it a statewide franchise to build and provide "facilities-based" services to wireless carriers.

103. The City's 2016 bad faith interpretation of the RUA that customer owned

transmitting units could not be used in the "Network" and were not permitted "Equipment" was an improper assertion of a breach to advance a theory whereby the City could terminate the RUA, in violation of the RUA and the implied covenant of good faith and fair dealing.

104. Additionally, the claim of material breach for Crown's purported failure to consider City owned structures in public rights was unsupported by the facts, ignored the lack of such structures throughout most of Rye in areas where the DAS expansion was proposed, and was unsupported under the RUA, which merely cites a City preference for use of such structures when available, subject to other terms and conditions benefitting Crown. (Exhibit 3 § 3.3).

TOLLING AGREEMENT EXTENSIONS, SETTLEMENT DISCUSSIONS, AND CROWN RE-ENGINEERING TO INCORPORATE A THIRD ALTERNATIVE USING CITY OWNED STRUCTURES IN THE RYE ROW

105. Considering the actions of the City, Crown entered into extensions of the Tolling Agreement with the City, continued to supplement the materials on file with the City Council, and engaged in settlement discussions with the City from November 2016 through February 2017.

106. In December of 2016, despite no legal relevance to the RUA and Crown's request/permit application, to allay any professed concerns from the public, Crown filed with the City Council an MAI real estate appraiser's report it had commissioned. That report concluded that the equipment attached to utility poles as proposed would have no impact on residential property values. At that time, Crown also furnished the City with additional technical information from Crown and its customer which confirmed the need for the planned DAS expansion in Rye for Crown's customer to be able to provide wireless services to the public.

107. On February 24, 2017, after months of settlement negotiations and reengineering of Crown's DAS expansion at considerable time and expense, Crown filed a third

alternative with the City requesting permit approval pursuant to RUA §§ 3 and 5 ("Plan C"). (A copy of Petitioner's February 24, 2017 "Plan C" submission is attached as **Exhibit 6**).

108. Plan C incorporated to the greatest extent practicable City owned structures (including poles and traffic lights) in the Rye ROW in the DAS expansion area, minimized the size of the equipment cabinet to the greatest extent practicable in accordance with Con Ed pole attachment requirements, incorporated City stated preferences for pole top antenna configuration, limited the number of locations to 64 as proposed in Plan B, and incorporated an all pole attachment plan with pre-approved equipment depicted in Exhibit A of the RUA. (Exhibit 6).

109. Crown further proposed conditions of City Council approval it would consent to that were consistent with federal and state law and which addressed the City's purported concern with customer owned transmitters inside equipment cabinets. (Exhibit 6).

110. Notwithstanding Crown's good faith efforts to address all City proffered issues, whether legally appropriate or not, according to a March 9, 2017 article in the Rye City Review, "Rye City Council members sa[id] they plan to reject an amended proposal from the telecom contractor Crown Castle which seeks to sprinkle new wireless equipment in Rye neighborhoods citywide." James Pero, *Council Poises to Reject Crown Castle Proposal*, http://www.ryecityreview.com/lead-stories/council-poises-to-reject-crown-castle-proposal/ (March 9, 2017, 11:42 a.m.).

111. In light of the City Council's stated intent to deny Crown's request/permit application in any form despite the terms of the RUA, Crown supplemented the record in April, 2017, as permitted in a Tolling Agreement extension, with submissions that included visual comparisons of equipment installed on existing Con Ed or City owned poles, including the results of a publicly noticed set of mock installations on poles in Rye, in order to demonstrate the minimal

visual effects of equipment proposed for installation by Crown.

112. A few hours before its April 19, 2017 hearing, which should have simply resulted in the record being closed and a decision issued pursuant to the parties' Tolling Agreement and extensions, the City served Crown with an opinion from a new and second technical consultant retained by the City. Even though this second opinion violated the terms of the Tolling Agreement, Crown provided substantive responses to the opinion over the next two days, despite the lack of legal relevance to Crown's request/permit application.

CITY COUNCIL'S SEQRA MISCLASSIFICATION OF THE ACTION AND SUBSEQUENT POSITIVE DECLARATION

113. At its April 19, 2017 hearing, the City Council erroneously failed to treat Crown's request/permit application as a Type II action exempt from SEQRA pursuant to Section 617.5 of SEQRA regulations and/or Section 11 of the RUA. A copy of the April 19, 2017 City Council Minutes, including the Resolution of the City Council of the City of Rye Making a Positive Determination of Significance Under SEQRA, is attached as **Exhibit 7**.

114. At the April 19, 2017 hearing, the City Council erroneously treated the action before it as subject to SEQRA and then promptly voted to adopt a positive declaration of significance without any reasoned consideration of the criteria set forth in Section 617.7 of SEQRA's regulations. (Exhibit 7, pp. 7-12).

115. In a one-page resolution, the City Council's unlawful positive declaration claimed, without any support, that there would be "significant adverse impacts" from placing additional DAS equipment on existing poles in the Rye ROW, including: (1) "[t]he potential for significant aesthetic/design/visual resource impacts and neighborhood character impacts"; (2) "[t]he potential for significant impacts related to noise associated with the two and three ion boxes"; and (3) "[t]he potential for significant impacts to the community character and locally

designated historic districts and landmarks" ("SEQRA Resolution"). (Exhibit 7, p. 11).

116. This finding ignored that as a matter of law, Type II actions, such as at issue here, have categorically been determined to not have significant adverse impacts on the environment, such that it was improper to require any SEQRA review, let alone an Environmental Assessment form, a negative or positive declaration, or an Environmental Impact Statement.

117. Upon information and belief, no prior communications installations in the Rye ROW have ever been classified as an Unlisted Action or required a Positive Declaration under SEQRA. This is common sense, as even the previous Mayor of Rye stated to CBS News that while "telephone poles are not pretty objects . . .when you put one of these antennas on top of one, they kind of blend right in . . ." "LI, Westchester Residents Concerned About Plans for New Cellphone Poles," http://newyork.cbslocal.com/2016/12/07/cbs2-exclusive-li-residents-concerned-about-cell-phone-poles/ (December 7, 2016, 11:11 p.m.).

118. Below is a picture of Petitioner's equipment on a pole, submitted to Respondents in an April 19, 2017 submission:

The Southern District of New York has ruled that placement of Petitioner's equipment on existing utility poles is a *de minimus* aesthetic intrusion, because "*utility poles throughout Greenburgh and Westchester County currently accommodate cables/wiring, transformers, and utility boxes of similar—or larger—sizes*;" therefore, Petitioner's "nodes do not appear to present a significant incremental visual impact to the area." Crown Castle NG East, Inc. v. Town of Greenburgh, No. 12–CV–6157 (CS), 2013 WL 3357169, *20 (S.D.N.Y. July 3, 2013), *aff'd*, Crown Castle NG East Inc. v. Town of Greenburgh, 552 Fed. Appx. 47, 50 (2d Cir. 2014) ("We agree with the district court that the intrusion was *de minimus*—the antenna added less than eight feet to *existing* thirty-foot utility poles, and photographs in the record show that [Petitioner's] installations would be no more intrusive than existing installations of other carriers").

THE CITY COUNCIL'S INTERPRETATIONS OF THE RUA AND EFFECTIVE PERMIT DENIALS

119. By its April 19, 2017 SEQRA Resolution, the City was by its own action bound as a matter of state law and SEQRA regulations from taking any further legal action on the Crown request/permit applications.

120. Nevertheless, the City Council held a special meeting on April 21, 2017 in the Mayor's conference room, noticed as "an attorney/client meeting to discuss confidential matters." The City Council met the next day, Saturday, April 22, 2017, and although the Crown request/permit application was not listed as an agenda item, the City Council adopted a resolution with respect to the Crown request/permit application ("Interpretation/Denial Resolution"). (A copy of the April 22, 2017 Minutes is attached as **Exhibit 8**).

121. The April 22, 2017 minutes announced the City's action of Petitioner's application in bold letters, and in no uncertain terms: **"RESOLUTION DENYING PROPOSED PLAN FOR PLACEMENT OF WIRELESS FACILITIES."** (Exhibit 8, p. 1).

122. The City Council's Interpretation/Denial Resolution erroneously stated the definition of "Public Way" in the RUA and the effect of the 2011 Consent Resolution; it stated Crown had no authority to install equipment on poles in non-City owned areas of the Rye ROW. (Exhibit 8, p. 2). This assertion is belied by the City's prior precedent and the plain text of the RUA, which Paragraph B of the Recitals acknowledges: "For purpose of operating the Network, [Petitioner] wishes to locate, place, attach, install, operate, control, and maintain Equipment in the Public Way (as defined below) on facilities owned by the City, as well as on facilities owned by third parties herein." (Exhibit 3, Recital B).

123. The City Council's Interpretation/Denial Resolution incorrectly states that the proposed Crown equipment installations were required to and did not comply with New York City Department of Information Technology and Telecommunications ("DoITT") equipment standards, a statement that is erroneous (such standards are not legally relevant in Rye, as they pertain to New York City), and which factually ignores that Crown's request/permit initial application was specifically to confirm permission to install larger equipment and that the later Plan B and Plan C alternatives exclusively incorporated pre-approved equipment as depicted in Exhibit A of the RUA as previously deployed as part of the Initial Installations and thousands of installations in New York City under DoITT standards. (Exhibit 8, pp. 6-7).

124. The City Council's Interpretation/Denial Resolution further misinterpreted the RUA's definition of "Equipment" in stating that Crown was not legally permitted to place its customers' transmitters in the equipment cabinet located on poles in the Rye ROW pursuant to the RUA. (Exhibit 8, p. 6). The City took this position notwithstanding the RUA contemplated that other carriers' equipment would be housed in connection with Petitioner's infrastructure and that any contrary reading which did not allow for same could render the RUA meaningless.

125. Additionally, the City Council's Interpretation/Denial Resolution misinterpreted the RUA to require Crown to prove that each equipment installation on a pole in the Rye ROW was needed to fill a significant gap in FCC carrier coverage as a condition precedent to permits being issued for equipment installations proposed pursuant to Sections 3 and 5.1, a standard found nowhere in the RUA. (Exhibit 8, p. 7).

126. The City Council's Interpretation/Denial Resolution misinterpreted Chapter 196 of the City Code to apply to Crown's proposed equipment installations in the Rye ROW, contrary to prior City precedent and in violation of the express terms of the RUA as set forth in Section 3. (Exhibit 8, p. 4).

127. The City Council's Interpretation/Denial Resolution determined that based on its assessment of the evidence in the record, it would deny the permit applications submitted by Crown even if it was reviewing same pursuant to the special permit standards set forth in Chapter 196 of the City Code. (Exhibit81, p. 4).

128. The City Council's Interpretation/Denial Resolution selectively and erroneously misinterpreted Section 3.3 of the RUA regarding the preference for municipal facilities. (*Compare* Exhibit 8, pp. 5-6 *with* Exhibit 3 § 3.3).

129. The City Council's Interpretation/Denial Resolution stated that to the extent the City's staff previously approved permits for the Initial Installations pursuant to Section 3 and 5.1 of the RUA, any such determinations were "not relevant to the question of whether the nodes can be approved under the RUA." (Exhibit 8, pp. 5-6).

130. The City Council's Interpretation/Denial Resolution made other various misinterpretations of the RUA without any support in fact or law.

131. The City Council even stated in its Interpretation/Denial Resolution that

denial was "action it would take based on Crown's proposal as if the proposed project were exempt from SEQRA," which of course it was under applicable SEQRA regulations and Section 11 of the RUA. (Exhibit 11, p. 2).

132. The City Council's Interpretation/Denial Resolution deceivingly states that there "appears to be a substantial contractual dispute between Crown and the City," omitting that this contractual dispute was of the City's own manufacturing in its effort to terminate the RUA in violation of Petitioner's rights under its CPCN, the City's 2011 Consent Resolution, as well as the RUA. (Exhibit 8, pp. 1, 8).

133. Finally, after a year of review of Crown's request/permit application, the City Council tried to justify all of its positions and actions by suggesting it was simply not constrained by any federal, state or City laws, and instead, was acting in its proprietary capacity with unfettered legislative discretion. (Exhibit 8, p. 8). This position completely contradicted the City's prior precedent and previous admissions.

134. The City's misinterpretations of the RUA and statements in the City Council's Interpretation/Denial Resolution constitute a denial of Crown's request/permit applications under the RUA and are final agency actions for purposes of this lawsuit.

THE CITY COUNCIL'S CONTINUING ABUSE OF SEQRA AND FURTHER CITY BREACH OF THE RUA DURING THE PENDENCY OF LITIGATION

135. In May of 2017, Crown timely filed the Federal Action in the United States District Court for the Southern District of New York pursuant to a venue selection clause in the parties' RUA, (Exhibit 3, § 11.6), and Respondents' consent to the White Plains branch of the SDNY as the appropriate choice of venue.

136. The Federal Action asserted several causes of action under federal, state and City laws challenging, among other actions of Respondents, the City Council's SEQRA Resolution

and contract/permit Interpretation/Denial Resolution.

137. During the pendency of the Federal Action and a limited motion to dismiss, the City's attorneys further took the position that the City Council enjoyed some form of continuing jurisdiction under SEQRA, despite the City Council's subsequent Interpretation/Denial Resolution (disingenuously citing it as "hypothetical" and expressly drafted to set up a possible defense to federal causes of action under statutes relevant to the Crown request/permit application).

138. Crown objected to counsels' positions, and the City Council's efforts to proceed with SEQRA review during the Federal Action, one that in part sought a determination under state law and the RUA that Crown's application was legally exempt from SEQRA.

139. The City Council rejected Crown's position, and over a period of six months from the date of its SEQRA Resolution: a) failed to notify Crown of its intent to conduct public scoping and timely request a draft scope from Crown prior to conducting a public scoping session for the content of a SEQRA environmental impact statement ("EIS") in violation of Section 617.8 of SEQRA regulations; b) despite preparing its own City draft scope for the EIS, failed to adopt a final scope within 60 days as required by Section 617.8 of the SEQRA regulations; c) adopted a final scope by resolution on October 18, 2017, six months after its SEQRA resolution issued in error of law; and d) incorporated several illegal requirements in the final scope for further study in the EIS and over Crown's objection, including a requirement violating Section 617.9(b) of the SEQRA regulations for Crown to study alternatives outside of the Rye ROW and Crown's authority under the RUA (including up to ten new communications towers up to 100 feet in height each on public and private sites in Rye as an alternative plan for wireless carriers to provide service in the community, a plan which Crown has no feasible control over as the project sponsor).

140. In a November 14, 2017 notice, Petitioner further notified Respondents of

their ongoing breaches of the RUA and violations of SEQRA and demanded the City cure same. (A copy of Petitioner's November 14, 2017 letter is attached as **Exhibit 9**).

141. The City did not respond to Petitioner's November 14, 2017 notice of breach letter, and the time for the City to cure its breaches has expired.

CROWN'S PLANNED DAS EXPANSION IS FURTHER POLITICIZED AS PART OF MAYORAL AND CITY COUNCIL ELECTIONS IN RYE

142. During the ongoing City Council proceedings, the principal representative of the Citizens Group opposing the planned Crown DAS expansion in Rye, Joshua Cohn, decided to run as a candidate for Mayor of the City against the incumbent.

143. The Crown request/permit application, RUA and application of SEQRA were central talking points of the candidates during the election and after.

144. In a statement published on October 31, 2017 then-Mayor Joe Sack as part of his party's election website, admitted unequivocally "the City Council denied Crown Castle's application." See Admin, *The Truth On Crown Castle*, http://allrye.com/news/truth-crown-castle/ (Oct. 31, 2017).

145. The same commentary further stated that opponents' proposals for new cell towers was "*in contrast to the option of less conspicuous 4 to 6 foot antennae atop telephone poles, with attached boxes*" and the issue only about "*how many, where, and what they will look and sound like.*" *Id.*

146. The election did not change the City Council's hostility. On December 12, 2017, Mayor-elect Cohn stated with respect to the Crown proposed DAS expansion: "*It is astonishing that the Council would allow private companies to impose unwanted cell towers on its constituents.*" See K. Reakes, *Rye Residents Angry Over Invasion of Mini-Cell Towers*, http://rye.dailyvoice.com/news/rye-residents-angry-over-invasion-of-mini-cell-

towers/692632/ (Dec. 12, 2017).

147. In an interview with Mayor-elect Cohn on December 17, 2017, the following exchange occurred:

> **Question: Your electoral platform was partially based on combating Crown Castle in court. Where does that effort stand?**
>
> **Answer:** It seems likely that Crown will appeal the federal court's dismissal. It'll be my administration in conjunction with the city's attorneys that will look at how to combat Crown's anticipated appeal. It will also be a priority of my administration to see that there is a full SEQRA review of alternatives to Crown's existing proposal.

See Gabriel Rom, *Wireless Company Lawsuit Against Rye City Dismissed*, http://www.lohud.com/story/news/local/westchester/2017/12/18/wireless-company-lawsuit-against-rye-city-dismissed/957495001/ (Dec. 18, 2017, 6:30 p.m., updated 7:44 p.m.).

148. Petitioner's legal rights have been adversely affected in final and binding determinations of Respondents that are ripe for judicial review.

149. Petitioner is entitled to redress as set forth in the Causes of Action herein, including but not limited to a judicial determination that Crown's request/permit application is exempt from SEQRA review, a mandatory injunction directing that Respondents issue all permits for Petitioner's equipment installations as listed in Plan C be immediately granted; and that Petitioner has not breached the RUA which remains in full force and effect.

FIRST CAUSE OF ACTION
(SEQRA, Type II Exemption, Pursuant To CPLR Article 78)

150. Petitioner incorporates by reference all prior allegations set forth herein.

151. Section 617.5 of SEQRA regulations states that: "(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise

precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies." (b) Each agency may adopt its own list of Type II actions to supplement the actions in subdivision (c) of this section. No agency is bound by an action on another agency's Type II list. An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency...."

152. Evidence in the record demonstrated that Crown's request/permit application involved installation of equipment in the Rye ROW that are listed as "Type II" under several subsections of Section 617.5(c) of SEQRA regulations.

153. The "extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list" are Type II actions pursuant to Section 617.5(c)(11) of SEQRA regulations.

154. The New York State Department of Environmental Conservation SEQRA Handbook even states that "if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II". DEC, *SEQRA Handbook* 33 (3d ed. 2010) (interpreting Section 617.5(c)(7)).

155. Section 11.1 of the RUA incorporates, as authorized by subsection (b) of Section 617.5 of SEQRA regulations, a prior City Council determination that Crown's equipment installed in the Rye ROW are "functionally equivalent to Type II actions under 6 N.Y.C.R.R. 617.5(c)(11)." (Exhibit 3 § 11.1).

156. Based on the foregoing, any City permits issued for Crown's installations of equipment permitted under the RUA are Type II exempt from SEQRA.

157. Respondents' determination, over a year after submission of Crown's request/permit application to install equipment on poles in the Rye ROW, that the action was not Type II but unlisted despite SEQRA regulations and the express terms of the RUA, was unlawful, in error of law and in all respects improper in violation of SEQRA and an abuse of municipal authority reserved under state law.

158. Petitioner is entitled to an order and judgment reversing the City's SEQRA Resolution and declaring Crown's installation of equipment under the RUA in the Rye ROW to be a Type II action exempt from SEQRA by operation of law.

SECOND CAUSE OF ACTION
(N.Y. Trans. Corp. Law Section 27 Consent & City Code Chapter 167/RUA Permits, And Reversal Of Denial Pursuant To CPLR Article 78)

159. Petitioner incorporates by reference all prior allegations set forth herein.

160. Petitioner's CPCN issued by the NYS PSC is a statewide authorization for it to access public rights of way for purposes of installing facilities based equipment for use by customers in providing wireless services to the public.

161. Section 167-5 of Chapter 167 of the City Code states that "[n]o person not otherwise authorized by law to do so shall erect or maintain on or over any street or sidewalk within the City any telegraph, telephone, electric light or other poles, or string wires in, over or upon any street, sidewalk or other public place, or over or in front of any building within the City, without the consent of the Council."

162. Respondents expressly consented to Petitioner's access to and use of the Rye ROW in the City Council's 2011 Consent Resolution, adopted in furtherance of Section 27 of the NYS TCL and various other federal laws, and municipal laws set forth in the Rye City Code.

163. Section 167-1 of Chapter 167 of the City Code states that "[i]t shall be

unlawful for any person to encumber or obstruct any street, sidewalk or other public place within the City, except for immediate transfer into or from the premises, or to erect or maintain any encroachment or projection in, over or upon any street, sidewalk or other public place, without a permit from the Clerk."

164. Sections 3 and 5.1 of the RUA, executed by the City in furtherance of the City Council's approval and 2011 Consent Resolution, specify the additional permit conditions associated with Crown's installation of equipment in the Rye ROW.

165. Petitioner's Plans B and C incorporated pre-approved equipment specifications depicted in Exhibit A of the RUA for installation in the Rye ROW.

166. Respondents failed to identify any lawful basis under Sections 3 and 5.1 of the RUA to reject permits for the locations of the proposed installations of equipment in Plan C within thirty days of its filing by Crown.

167. Respondent's failure to act on Plan C by March 24, 2017 resulted in such permits being deemed granted by operation of law pursuant to Sections 3 and 5 of the RUA.

168. Additionally, evidence in the record required the approval of Petitioner's request to deploy infrastructure in the Rye ROW.

169. Petitioner's approval request complied with all applicable requirements.

170. Respondents effectively denied Petitioner's application by unlawfully imposing SEQRA review and by stating in the April 22, 2017 resolution that it was describing the "action it would take based on Petitioner's proposal as if the proposed project were exempt from SEQRA," and that assuming that the City is required by law to "make a determination as of this date based on the plans before it . . . the City concludes that the requests for placement . . . should be denied." The City later confirmed on October 31, 2017 that "the City Council denied Crown

Castle's application," and this is further confirmed by the title of the City's resolution itself.

171. The denial was not based on substantial evidence in the record or even on whether Petitioner had complied with applicable review standards applied to other utility providers in the Rye ROW, particularly because the City's review jurisdiction was limited by state law, the CPCN and the RUA.

172. The City's denial of Petitioner's application was an error of law, arbitrary and capricious and in violation of New York State law and Respondents' own precedent by disregarding the review process the City employs for other utility providers in the Rye ROW, including the administrative review process that Respondents applied to Petitioner's initial node installations following the City's consent to use the Rye ROW in 2011, warranting reversal pursuant to Article 78 of the New York CPLR.

173. Petitioner is entitled to an order and judgment mandating Respondents to immediately issue all necessary permits and authorizations for the equipment and locations listed in Petitioner's Plan C so that Petitioner may immediately make such installations as part of its planned DAS expansion in Rye. To the extent SEQRA applied to Crown's request/permit application, Respondents' determination, over a year after submission of Crown's request/permit application to install equipment on poles in the Rye ROW, violated the timing required by Section 617.6 of SEQRA regulations.

THIRD CAUSE OF ACTION
(For Breach of Contract)

174. Petitioner herein incorporates by reference all prior allegations.

175. Petitioner has a valid, existing and valuable contract with the City, which is the RUA dated February 17, 2011.

176. Pursuant to the 2011 Consent Resolution, RUA and prior permit

applications approved for the Initial Installations, the City rendered several legally binding City Code and RUA interpretations and determinations that are binding on Respondents.

177. Respondents previously interpreted and determined that Petitioner is authorized to install equipment in all of the Rye ROW, not just City streets, as set forth in the definition of "Public Way" in the RUA and evidenced by the City's signature on a permit for one of the Initial Installations in a County of Westchester public right of way in Rye.

178. Respondents previously interpreted and determined that Chapters 196 and 197 of the City Code do not legally apply to Petitioner's installations of "Facilities" in its "Network" providing "Services" as such terms are defined in the RUA because such installations are in the Rye ROW subject to City Council jurisdiction under Chapter 167 of the City Code.

179. Respondents previously interpreted and determined that FCC licensee equipment may be installed inside cabinets as part of the permitted "Equipment" as such term is defined in the RUA.

180. Respondents previously interpreted and determined that permits for pre-approved equipment depicted in Exhibit A of the RUA involves Type II actions exempt from SEQRA.

181. Respondents breached the RUA by failing to treat Petitioner the same as ILEC and cable providers, including by subjecting Petitioner to zoning review provisions and SEQRA review when cable companies have been permitted to install Wi-Fi nodes (using the same technology) in the Rye ROW without City Council review.

182. Respondents breached the RUA by imposing on Petitioner requirements beyond those permissible by the terms of the agreement and Respondents' prior interpretations and determinations of the agreement itself and City Codes.

183. Respondents breached the RUA when they adopted the Interpretation/Denial Resolution in contravention of its own prior interpretations and determinations incorporated into the 2011 Consent Resolution and the duly delegated authority to City staff acting in accordance with the RUA executed by the City.

184. Respondents breached the RUA when they adopted the SEQRA Resolution that violated Section 11.1 of the RUA.

185. Respondents refusals to act on and effective denial of Crown's request/permit application breached Sections 3 and 5.1 of the RUA.

186. As a direct and proximate result of Respondents' breach of contract, Petitioner has been damaged by its inability to deploy its network infrastructure in the Rye ROW, and the City has deprived Plaintiff of the benefit of its bargain with respect to the RUA.

187. Petitioner is entitled to the City's specific performance of its contractual obligations under the RUA, and an order and judgment invalidating the City Council's Interpretation/Denial Resolution and mandating that the City immediately grant Petitioner's request and issue all necessary permits and authorizations for equipment listed in Plan C.

188. Petitioner is also entitled to damages in an amount to be determined at trial, including but not limited to damages caused by delays and increased costs associated with Respondents' intentional and bad faith actions, including Petitioner's lost profits and consequential damages.

FOURTH CAUSE OF ACTION
(SEQRA Violations and Arbitrary and Capricious Determinations Pursuant To CPLR Article 78)

189. Petitioner incorporates by reference all prior allegations set forth herein.

190. To the extent SEQRA applied to Crown's request/permit application, Respondents' determination that the action was one involving the potential for significant adverse environmental impacts pursuant to the criteria set forth in Section 617.7 of SEQRA regulations warranting a positive declaration, was unsupported by the record, arbitrary and capricious and in all respects improper in violation of SEQRA and an abuse of municipal authority reserved under state law.

191. To the extent SEQRA applies to Crown's request/permit application, Respondents' implementation of scoping was in procedural violation of Section 617.8 of SEQRA Regulations.

192. To the extent SEQRA applies to Crown's request/permit application, Respondents' determination over six months after adopting its SEQRA Resolution to require Petitioner to prepare an EIS, to adopt a final scope which mandates the study of alternatives that are not feasible and within the control of the project sponsor violates the requirements set forth in Section 617.9 of SEQRA regulations.

193. To the extent SEQRA applies to Crown's request/permit application, Petitioner is entitled to an order and judgment reversing the positive declaration in the City's SEQRA Resolution and declaring null and void the final scoping document adopted by the City Council.

FIFTH CAUSE OF ACTION
(For Breach of the Implied Covenant of Good Faith and Fair Dealing)

194. Petitioner herein incorporates by reference all prior allegations.

195. Petitioner has a valid, existing contract with the City, which is the RUA.

196. Implied in the RUA is the covenant of good faith and fair dealing that New York law recognizes is inherent in all contracts, and such covenant, among other things, prohibits a party to a contract from acting in a manner that would subvert the primary purpose of, and deprive the other party of the fruits of, the bargained for exchange which is the subject of the contract.

197. The City breached the implied covenant of good faith and fair dealing by attempting to terminate the RUA based on a specious interpretation advanced by Respondents related to customer owned units being installed as part of the "Equipment" used in the "Network" to provide "Services".

198. As a direct and proximate result of the City's breach of the implied covenant of good faith and fair dealing, Petitioner has been damaged by its inability to deploy its infrastructure in the Rye ROW and deprivation of its benefit of the bargain under the RUA.

199. As a remedy for the City's breach of the implied covenant of good faith and fair dealing, Petitioner is entitled to damages in an amount to be determined at trial, including but not limited to Petitioner's lost profits and consequential damages, an order and judgment rejecting Respondent's Interpretation/Denial Resolution and mandating that the City immediately grant Petitioner's request and issue all necessary permits and authorizations for installations listed in Plan C and pre-approved Exhibit A equipment.

SIXTH CAUSE OF ACTION
(For Declaratory Judgment)

200. Petitioner herein incorporates by reference all prior allegations.

201. A justiciable controversy exists between the parties, with Petitioner contending that it has a right to install equipment on existing structures in the Rye ROW subject to the terms and conditions of the RUA, including Sections 3, 5.1 and 11 thereof and the City contending that it has a right to terminate the RUA and require Petitioner to complete an EIS and apply for and obtain special permits for the DAS expansion under Chapter 196 of the City Code.

202. A justiciable controversy exists between the parties, with Petitioner contending that it has all relevant times been in full compliance with the RUA, and that, in the absence of a lawful basis for denial of permits under Chapter 167 and the RUA, Plan C was required to be approved by Respondents and permits were deemed granted by operation of law due to the City's inaction within the time period proscribed in the RUA.

203. A justiciable controversy exists between the parties, with Petitioner contending that its application to install equipment on existing structures in the Rye ROW is a Type II action under SEQRA, which is not subject to SEQRA review.

204. The City disagrees with each of the positions articulated in the allegations set forth immediately above as set forth in the City Council's Interpretation/Denial Resolution which does nonetheless assert there is a contract dispute between the parties.

205. A judicial declaration is thus necessary to resolve the parties' controversy, and Petitioner is entitled to such declaration holding that it may install pre-approved Exhibit A equipment in locations listed in Plan C with no further action required by the City under SEQRA, and that Petitioner has at all relevant times been in full compliance with the RUA, and that the RUA does not restrict Petitioner from incorporating customer owned units as part of its DAS network expansion in the Rye ROW, and that the RUA remains in full force and effect.

WHEREFORE, Petitioner/Plaintiff respectfully requests the following:

(1) A judicial determination that Crown's installation of pre-approved equipment identified in Exhibit A of the RUA involves Type II actions exempt from SEQRA;

(2) A judicial determination that Crown's Plan C was exempt from SEQRA, and deeming granted all necessary City permits pursuant to the terms of the RUA;

(3) An order directing Respondents to immediately grant Petitioner all City permits and authorizations for Plan C;

(4) An order overturning the City Council's SEQRA Resolution, Interpretation/Denial Resolution and final scoping document purportedly issued pursuant to SEQRA;

(5) A declaration that Petitioner has all relevant times been in full compliance with the RUA, that the RUA does not restrict Petitioner from incorporating customer owned units as part of its DAS network expansion in the Rye ROW, and that the RUA remains in full force and effect; and

(6) Damages in an amount to be determined at trial, including but not limited to Petitioner's lost profits and consequential damages, costs, expenses, and attorneys' fees, along with such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
January 8, 2018

CUDDY & FEDER LLP
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(914) 761-1300

By: _____
Christopher B. Fisher
Andrew P. Schriever
Leanne M. Shofi

VERIFICATION

STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

Christopher B. Fisher, being duly sworn, deposes and says:

I am a Partner of Cuddy & Feder LLP, attorneys for Crown Castle NG East LLC, Petitioner/Plaintiff in the above-captioned proceeding, which party is not in the County where my law firm maintains its office. This Verification is therefore being submitted pursuant to CPLR 3020(d)(3). I have read the annexed Verified Petition/Complaint, and the same is true to my knowledge, except as to those matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Sworn to before me this
8th day of January 2018

Notary Public

Danielle R. Calder
Notary Public, State of New York
No. 01CA6275213
Qualified in Westchester County
Commission Expires January 22, 21

VERIFICATION

STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

Peter D. Heimdahl, being duly sworn, deposes and says:

I am the Director of Government Relations of Crown Castle NG East LLC, Petitioner/Plaintiff in the above-captioned proceeding. I have read the annexed Verified Petition/Complaint, and the same is true to my knowledge, except as to those matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

P. D. Heimdahl

State of WI County of St Croix
Sworn to before me this
8th day of January 2018

Nancy Geister
Notary Public
my commission expires 18 Feb 2018

NANCY GEISTER NOTARY PUBLIC STATE OF WISCONSIN